BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY BALL	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 219,441 & 219,442
OVERNITE TRANSPORTATION COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Steven J. Howard dated April 16, 1997, wherein Judge Howard granted claimant authorized medical treatment with Drs. Drisko, Fee, and Parker; ordered respondent to pay medical expenses totalling $1,813.25; and held the issue of temporary total disability compensation under advisement pending receipt of updated medical.

ISSUES

(1) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged.

(2) Whether claimant provided notice to respondent of the alleged accidental injuries pursuant to K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges two separate accidental injuries occurring while employed with respondent. The first is alleged to have occurred on August 1, 1996, when claimant, while unloading a truck, suffered a sudden onset of pain in his back. Claimant advised no one of this injury, sought no medical treatment, and continued performing his job duties. The second incident occurred on August 7, 1996, while claimant was traveling with his

co-driver. Claimant had concluded his driving shift and was asleep in the sleeper cab of the semi-tractor trailer when he awoke with a sudden onset of pain. Claimant described no specific trauma which led to this incident. Shortly thereafter claimant advised Jeffrey S. Baar, the respondent's road dispatcher, that his back was hurting and he was going to need a replacement driver. He did not advise Mr. Baar that the back pain was attributable to any specific trauma or accident suffered on the job.

Claimant left work and went to a local chiropractor, Dr. Hughes, with whom claimant had an ongoing doctor/patient relationship for approximately 25 years. Claimant did not advise respondent of the treatment with Dr. Hughes nor did he request Dr. Hughes' bills be paid through workers compensation. He instead submitted these bills for payment through his normal health insurance carrier. Dr. Hughes advised claimant to contact his family physician or the hospital. Claimant then went to his family physician, Eric G. Sollars, M.D., and was eventually referred to Patricio H. Mujica, M.D., a neurosurgeon in St. Joseph, Missouri. Dr. Mujica performed a right L4-L5 hemilaminectomy and diskectomy on claimant's lumbar spine on August 12, 1996. Claimant at no time advised respondent of the surgery prior to the date of surgery.

Respondent was first advised that claimant was alleging a work-related injury on September 7, 1996, when Jeffrey Wry, the assistant terminal manager in Kansas City, was contacted by claimant regarding the work-related injuries on August 1, 1996, and August 7, 1996. Mr. Wry prepared a Kansas Employer's Report of Accident and filed it with the Director of Workers Compensation shortly thereafter. Claimant had prepared an Employee's Report of Work Injury which, while dated August 16, 1996, was stamped received by the respondent on September 5, 1996, the day before the Employer's Report of Accident was prepared by Mr. Wry. Claimant acknowledged he was unsure of when he gave the Employee's Report of Work Injury to respondent.

Claimant continued treatment with Dr. Mujica and underwent a second surgical procedure on October 22, 1996, which included a left T12-L1 hemilaminectomy with proximal facetectomy and transpedicular resection of the herniated thoracolumbar disc.

At the time of preliminary hearing claimant had not returned to employment with respondent but it was anticipated claimant would be returned to work in the near future.

All medical bills associated with claimant's ongoing treatment and both surgeries were filed with claimant's health insurance carrier rather than with respondent's workers compensation insurance carrier.

The Appeals Board will first consider whether claimant suffered accidental injuries on the dates alleged. Claimant's testimony regarding the sudden onset of pain on August 1, 1996, is uncontradicted. There is no evidence to indicate claimant suffered the accidental injury on any date other than August 1, 1996, or in any manner other than that described by claimant. Uncontradicted evidence which is not improbable or unreasonable

may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The uncontradicted evidence of claimant regarding the injury of August 1, 1996, is accepted by the Appeals Board as credible and it is found that claimant did suffer accidental injury arising out of and in the course of his employment on the date alleged.

Dr. Mujica, in his medical report of November 19, 1996, opined that claimant's ongoing back difficulties were the result of the incident which occurred on August 1, 1996. He does note claimant had a history of back and leg pain evidenced by the long history of chiropractic treatments experienced by claimant. He does, however, indicate that claimant's clinical findings and diagnoses are compatible with the incident as described by claimant as occurring on August 1, 1996. He felt that all of claimant's symptoms resulting in both the lumbar and thoracic spine surgeries were the result of the one single incident of August 1, 1996. This opinion is also uncontradicted. Therefore, the Appeals Board finds that the symptomatology suffered by claimant on August 7, 1996, while riding in the sleeper of the tractor trailer, was a natural consequence of the original August 1, 1996, injury. When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977).

The Appeals Board must next consider whether claimant provided notice to respondent of the accidental injuries.

It is noted that this is not the first time claimant suffered a work-related injury while employed with respondent. Claimant experienced a slip and fall in 1993 and immediately notified respondent on the appropriate workers compensation forms of the incident. This incident was minor and resulted in no lost time and no medical treatment to claimant. Claimant, however, acknowledged that he was aware of the requirement that he report any injury to respondent immediately. Respondent's representative, Mr. Wry, testified that the appropriate State of Kansas Workers Compensation forms specifying the notice requirements were posted in at least two places including the drivers' break room and the shop in Kansas City. He stated that he checked the forms every month, at the first of the month, to insure their proper posting.

K.S.A. 44-520 states in part:

> "Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided

> in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The Appeals Board must consider whether claimant's contact with Mr. Baar on or about August 7, 1996, constitutes notice of an accident. Claimant acknowledged he advised Mr. Baar that his back was hurting and that a replacement driver might be necessary but he also agreed that he at no time advised Mr. Baar that he had suffered any type of work-related accident or described the incident of August 1, 1996. Claimant acknowledged that during the single contact on or about August 7, 1996, he made no reference to this being a work-related accident, merely indicating that he was in pain.

The first time respondent acknowledged notice of the incident occurred on September 7, 1996, when Mr. Wry received claimant's Employee's Report of Work Injury specifying the incidents of August 1, 1996, and August 7, 1996, as work-related injuries.

The Appeals Board finds that claimant has failed to prove that the appropriate notice of accident was given within ten days of either August 1, 1996, or August 7, 1996. The contact with respondent was merely an inference that claimant had back pain with no indication of an "accident."

The Appeals Board must next consider whether claimant had just cause for failing to provide respondent with the notice as required. Claimant acknowledged the pain experienced on both August 1, 1996, and August 7, 1996, was substantially different than anything he had ever felt in the past. He further acknowledged that up to August 7, 1996, he had never had to miss work but subsequent to August 7, 1996, was unable to return to work. Claimant further acknowledged he provided no information to respondent prior to either surgery that he was planning to undergo surgery and all of the medical bills attributed to both surgeries were filed with his health insurance carrier.

The Appeals Board finds, based upon the credible evidence, that claimant has failed to prove notice was provided to respondent as required by K.S.A. 44-520 and has failed to provide just cause for his failure to notify respondent of the accidents. As such, claimant is precluded from maintaining this proceeding for compensation pursuant to K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated April 16, 1997, should be, and is hereby, reversed and claimant is denied benefits for purposes of preliminary hearing for the injuries of August 1, 1996, and August 7, 1996.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

c: David Ben Mandelbaum, Kansas City, MO
Jeff S. Bloskey, Kansas City, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director